Supreme Court, U.S.
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No. (1)

In The

Supreme Court of the United States

DEMETRIS CRAWFORD,

Petitioner,

vs.

GREAT AMERICAN CASH ADVANCE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Federal Arbitration Act apply in state court proceedings, so as to preempt all state laws regulating or restricting arbitration?

PARTIES TO THE PROCEEDING

The parties to the proceeding are all named in the caption hereof, except that Petitioner has been certified by the Magistrate Court of Richmond County, Georgia as a class representative on behalf of all persons similarly situated.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Demetris Crawford, respectfully requests that a writ of certiorari be issued to review the judgment of the Court of Appeals of Georgia in this case.

REPORTS OF OPINIONS

The Opinion of the Court of Appeals of Georgia in this matter is reported at 284 Ga.App. 690, 644 S.E.2d 522 (2007). The denial by the Supreme Court of Georgia, without opinion, of Petitioner's petition for certiorari is not reported. The decision of the Superior Court of Richmond County, Georgia, from which appeal was taken, is not reported.

STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals of Georgia in this matter was entered on March 29, 2007. There was no application for re-hearing. Petitioner filed a petition for writ of certiorari with the Supreme Court of Georgia, which was denied by order entered June 25, 2007. This Court has jurisdiction to review this Judgment by writ of certiorari by reason of 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The petition involves the construction of Sections 2 and 3 of the Federal Arbitration Act, 9 U.S.C. §§ 2 and 3, the verbatim text of which is as follows:

> **Section 2. Validity, irrevocability and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> **Section 3. Stay of proceedings where issue therein referable to arbitration**
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the

stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

Respondent Great American Cash Advance, Inc. made two loans of $300 each to Petitioner Demetris Crawford. Respondent's form loan contracts were "payday loans" as defined by the Georgia Payday Loan Act, O.C.G.A. § 16-17-1 *et seq.*, which makes such loans "void *ab initio*". O.C.G.A. § 16-16-3. The loan contracts provided for interest rates of 176.61% and 238.04%, respectively.

Each contract contained an arbitration clause providing that the construction, interpretation and application of the arbitration clause would be controlled by the Federal Arbitration Act., 9 U.S.C. § 1 *et seq.* (the "FAA"). Georgia law, like federal law, favors arbitration in general, *Ghertner v. Solaimani,* 254 Ga.App. 821, 563 S.E.2d 878 (2004), but as a matter of public policy the General Assembly of Georgia has provided in the Georgia Arbitration Code that a predispute arbitration clause shall not be enforced if contained in a consumer financing agreement such as the small loan contracts in this case. O.C.G.A. § 9-9-2(c)(5). The FAA contains no such exception, indeed, no exceptions at all.

Respondent's arbitration clause contained an exception that allowed Respondent, but not Petitioner, to bypass arbitration and sue directly in court

to enforce the "lender's rights to enforce the borrower(s) payment obligations, in the event of default. . . ." (that is, in fact, all claims Respondent would ever have). Respondent sued Petitioner on the alleged debt in the Magistrate Court of Richmond County, Georgia. Petitioner defended on the ground that the contracts were illegal and asserted, as a compulsory counterclaim and class action, the statutory cause of action provided to victims of usurious payday loans under the Georgia Payday Loan Act, which expressly authorizes such a class action. O.C.G.A. § 16-17-3.

The Magistrate Court certified a class action on the counterclaim and, finding that it did not have jurisdiction of the class action, severed the counterclaim and transferred it as a separate action to the Superior Court of Richmond County. The Magistrate Court then held the contracts on which Respondent sued to be illegal under the Georgia Payday Loan Act and entered judgment for Petitioner, a judgment which was not appealed.

In the Superior Court action on the class action counterclaim, Respondent moved for an order requiring arbitration. The Superior Court found that, as a matter of federal law, the FAA as interpreted by this Court required that this entire controversy be referred to arbitration, pre-empting the application of the Georgia Arbitration Code, with its exclusion of this claim from the operation of a pre-dispute arbitration clause. This ruling was upheld by the Court of Appeals of Georgia in the opinion for which review is

sought herein. Certiorari was denied by the Supreme Court of Georgia.

ARGUMENT

In 1984, this Court ruled for the first time that the FAA, enacted 59 years earlier, controls in state court proceedings, preempting all state laws regulating or restricting arbitration in any context. *Southland Corp. v. Keating,* 465 U.S. 1, 104 (1984). The very extensive reach of *Southland* became apparent in *Allied-Bruce Terminix v. Dobson,* 513 U.S. 265 (1995), which gave the words "affecting commerce" in the FAA the broadest reading possible under the Commerce Clause of the federal Constitution. *Allied-Bruce Terminix* arose from a state court proceeding involving a state statutory restriction on the enforcement of predispute arbitration clauses in certain cases. The Court declined to reconsider its ruling as to the FAA's applicability in state courts.

Since 1995, the *Southland* holding has been applied, in a series of cases in this Court and elsewhere, to preempt all state laws restricting or regulating the application of arbitration in consumer contracts and otherwise, effectively preventing any state regulation of arbitration whatsoever. See, *e.g., Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996) (involving the modest state requirement of visual prominence for the arbitration clause within a contract). In the most recent (and perhaps the most

extreme) of this series, however, this Court took the step of noting specifically that it had not been asked to reconsider the *Southland* ruling and was therefore not doing so. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 446 (2006).

Petitioner seeks such reconsideration herein. Contract law is an area of traditional state regulation which federal courts should be "reluctant to federalize". *Patterson v. McLean Credit Union,* 491 U.S. 164, 183 (1989). This includes, or should include, the law of arbitration agreements. Furthermore, the allocation of decision making responsibility within state court systems is a matter of particular state concern. The Court's adherence to *Southland* has created not only a massive displacement of the states' authority to regulate the use of arbitration in their own judicial systems, but also an unwarranted total preemption of the ability of the states to protect their citizens by restriction or regulation of arbitration where changing circumstances require such protection.

1. The *Allied-Bruce Terminix* Court was wrong when it refused in 1995, for reasons of *stare decisis,* even to reconsider its *Southland* decision requiring the states to apply Section 2 of the FAA even in their own court systems.

Allied-Bruce Terminix refused to reconsider *Southland*'s sweeping preemption of state law, although it characterized the federalism pre-emption issue as "difficult" and acknowledged that it had not

been "thoroughly briefed" in *Southland*. 513 U.S. at 272. The Court determined that it should be bound by *stare decisis* not to reconsider the decision.

In dissent, Justice Scalia argued that this refusal to reconsider *Southland* was a grave mistake:

> "I do not believe that proper application of *stare decisis* prevents correction of the mistake. Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. Abandoning it does not impair reliance interests to a degree that justifies this evil."

513 U.S. at 284-285.

The refusal of *Allied-Bruce Terminix* to revisit *Southland* rested on four remarkably feeble reasons expressed in only one paragraph. These reasons were:

> (1) "Nothing significant has changed in the 10 years subsequent to *Southland*";
>
> (2) "[N]o later cases have eroded *Southland*'s authority; and no unforeseen practical problems have arisen";
>
> (3) "Private parties have likely written contracts relying upon *Southland* as authority"; and
>
> (4) "Congress, both before and after *Southland,* has enacted legislation extending, not retracting, the scope of arbitration".

513 U.S. at 272.

These reasons were not persuasive in 1995. They are far from sufficient today to require this Court to continue its refusal even to consider rectifying a mistake which implicates important principles of federalism and has led to grave injustices in practice.

Even if it were true that "nothing [had] changed" and "no unforeseen practical problems [had] arisen" between 1984 and 1995, much has changed since 1995 in this regard. There has been a rapid proliferation of arbitration clauses into consumer-oriented, small dispute contexts. *See* Stepanovich, *Punitive Damages and the Consumerization of Arbitration,* 92 Nw. U. L. R. 1 (1997), and Smith, *Mandatory Arbitration Clauses in Consumer Contracts, Consumer Protection and the Circumvention of the Judicial System,* 50 DePaul L. Rev. 1191 (2001). It has now become routine for the writers of adhesion contracts to include a reference to the FAA. This is precisely the injury to states and their citizens that Justice O'Connor feared would follow from *Allied-Bruce Terminix*:

> The reading of section 2 adopted today will displace many state statutes carefully calibrated to protect consumers, see, *e.g.*, Mont.Code.Ann. § 27-5-114(2)(b) (refusing to enforce arbitration clauses in consumer contracts where the consideration is $5,000 or less), and state procedural requirements aimed at ensuring knowing and voluntary consent, see, *e.g.*, S.C. Code Ann. §15-48-10(a) (Supp. 1993) (requiring that notice of

> arbitration provision be prominently placed on first page of contract)."

513 at 282.

Many cases arising from the wholesale application of the FAA to local consumer disputes have reached the courts, including this Court. Most recently, this Court was forced by the logic of *Southland* to require that, even where a consumer was the victim of a spectacularly usurious (as in this case) contract which (like the ones herein) was illegal under state law, the consumer was required to submit to the process of arbitration, even where the state had determined that such a process was burdensome and unfair. *Buckeye Check Cashing, Inc. v. Cardegn, supra.* Perhaps the extremity of this result motivated this Court to note in *Cardegna* that it had not been asked to reconsider *Southland.* The time for such a reconsideration has now arrived.

(2) If it was true in 1995, and if it is true now, that "no subsequent cases have eroded *Southland*'s authority", this results from the extraordinarily wide sweep and status of the *Southland* opinion as to preemption. Under this Court's holdings in *Agostini v. Felton,* 521 U.S. 203 (1997), and similar cases, the *Southland* decision is quite simply irreformable by any authority other than this Court itself. All judicial attempts to mitigate the pernicious effects of *Southland* have foundered on the rock of *Southland*'s sweeping denial of any power in this regard to the courts of the fifty states. It should be noted that

disputes of the kind presented in this case do not normally come within the purview of the federal courts. Small consumer loan disputes as to which Georgia has attempted to protect consumers from the burden of arbitration do not raise federal questions, because the regulation of small loans is a matter traditionally relegated to the states.

Although both the majority opinion in *Allied-Bruce Terminix* and Justice O'Connor's concurrence were based in part on a reluctance to disappoint the expectations created by contracts which might have been formed on the basis of *Southland*, no evidence was presented that many such contracts existed as of 1995. In particular, with reference to Justice O'Connor's concerns, the Court was told at oral argument, in response to a specific question, that there was no precedent for the application of *Southland* to consumer contracts:

> Question: . . . Let me ask you this: are there appellate court decisions or are there a significant number – the act's been on the books now for 70 years. Have there been consumer contracts that appellate courts have said are subject to this statute?
>
> Mr. Farr: I don't think, at least in ones that I'm aware of, that there are decisions about consumer contracts one way or the other.

1994 WL 665278, at 13-14.

Since 1995, vast numbers of adhesion contracts, usurious small loan contracts, and other agreements

have undoubtedly been written to obtain the benefit of *Southland* for the dominant party. The question is, however, whether this factor alone should prevent the Court from addressing and rectifying its prior mistake. The overruling of the *Southland* conclusion would affect, not the legal principles necessary to resolve a contractual dispute, but the identity of the forum in which it would be resolved. Unless it was clearly the intent of Congress in 1925 to implement a policy judgment that arbitration is always and everywhere superior to court proceedings, in any forum, state or federal, regardless of the type of dispute involved, the disparity of bargaining power between the parties or any other factor, *Southland* should be reconsidered.

The interest violated by *Southland* is the interest of the states in operating their own court systems in accordance with their own public policy regarding the use and regulation of arbitration. This is an interest of far greater significance than the interest of any private litigant in a particular procedure for resolving his contract dispute.

The fourth reason given by the *Southland* court for refusing to reconsider *Southland* was that Congress had subsequently extended the reach of arbitration by abolishing the "Act of State" doctrine as a bar to arbitration and by extending arbitration to international disputes, citing 9 U.S.C. § 15 and §§ 201-208. These extensions, of course, concern matters peculiarly within the purview of Congress and cannot, or at least should not, be construed as any kind of

endorsement by Congress of the intrusion of the Federal Arbitration Act into state proceedings.

Addressing the principle of *stare decisis*, *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), sets down reasons that would justify reconsideration: (1) when the case itself represented an abrupt and largely unexplained departure from earlier law in the area; (2) when the case as decided has been the subject of continuing controversy and confusion, with the great weight of scholarly opinion being critical of the decision; and (3) where the experience over time shows the application of the decision to have been harmful. 433 U.S. at 47-49.

Southland was an abrupt departure from earlier law in the area. It has been and continues to be criticized, particularly with regard to the supposed Congressional intent upon which it is based. See, *e.g.*, Hayford & Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 Fla. L. Rev 175 (2002); Brunet, *Toward Changing Models of Securities Arbitration*, 62 Brook L. Rev. 1459, 1469 n.33 (1996); Carrington & Haagan, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 380; and Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 Law & Contemporary Problems 5 (2004).

Further, experience over time has shown the result of *Southland* has been to imprison arbitration law in the unbreakable box of complete preemption.

The states, before whose courts the vast bulk of arbitration issues now arise, have been completely stripped of their ability to respond in any way to the changed and changing contexts of arbitration. The Court was wrong in *Allied-Bruce Terminix* to refuse to consider *Southland* as it affected state courts. Even if it was reasonable to conclude in 1995 that no problems requiring reconsideration of *Southland* had developed, it would not be reasonable so to conclude today.

2. The *Southland* Court was wrong in concluding that the FAA must be applied by state courts in their own proceedings, eliminating any ability of the states to regulate the allocation of decision-making in their own court systems, as between arbitration and judicial determination.

Two Justices, one of them being Justice O'Connor, in a well-reasoned dissent in *Southland* disagreed with the holding of the Court that the FAA applied to state court proceedings, because it was, on its face and by its legislative history, a procedural statute for the federal courts alone. 465 U.S. at 22-38. A recent inquiry by a writer sympathetic to the wide extension of arbitration, observes that "most – but not all – scholars to consider the issue since *Southland*" have concluded, "some quite harshly", that Justice O'Connor in dissent was correct as to the legislative history. Drahozal, *Federal Arbitration Act Preemption,* 79 Ind. L.J. 393, 400-401 (2004).

In *Allied-Bruce Terminix* Justice O'Connor, although concurring with the decision not to redress the preemption issue because of considerations of *stare decisis,* continued to point out the wrongness of the *Southland* decision:

> "I have no doubt that Congress could enact, in the first instance, a federal arbitration statute that displaces most state arbitration laws. But I also have no doubt that, in 1925, Congress enacted no such statute. Were we writing on a clean slate, I would adhere to that view and affirm the Alabama court's decision. . . ."

513 U.S. at 283-284.

In *Southland*, Justice Stevens was troubled by so much of the majority opinion as declared that the FAA completely displaced state authority to act in the field, perceptively writing:

> "The general rule prescribed by section 2 of the Federal Arbitration Act is that arbitration clauses in contracts involving interstate commerce are enforceable as a matter of federal law. That general rule, however, is subject to an exception based on 'such grounds as exist at law or in equity for the revocation of any contract.' I believe that exception leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses."

465 U.S. at 862.

This limitation on the holding, however, did not materialize. On the contrary, the potential invasion of the rights of states to exercise their police powers to protect their citizenry, and their rights to control the allocation of responsibility within their own judicial systems has become a reality.

As early as 1987, Justice Stevens, who had joined in the *Southland* opinion, reiterated his concern about the potential damage to States' authority to regulate their own judicial processes, as well as their policy choices to preserve the right to go to court for certain types of claims brought about by *Southland*'s expansive extension of the FAA:

> Even though the Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the Court nor the litigants even considered the possibility that the Act had pre-empted state-created rights. It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend. See *Southland Corp v. Keating* . . . because I share Justice O'Connor's opinion that the States' power to except certain categories of disputes from arbitration should be preserved unless Congress decides otherwise, I would affirm the judgment of the California Court of Appeal.

Perry v. Thomas, 482 U.S. 483, 493-4 (1987) (Stevens, J., dissenting)

While the *Southland* result rests entirely on a supposed Congressional intent to intrude on the state courts in a fundamental and far-reaching way, most available evidence points to the conclusion that such an intent did not exist and even that it would have been virtually inconceivable to legal authorities at the time that Congress could so act. In the House Report summarizing the FAA, as quoted in a recent law review article:

> Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court [sic] in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized by the courts of the United States.

Schwartz, *supra,* p. 19 and footnote 91.

This quotation makes it quite clear, contrary to the conclusion of the Court in *Southland,* that the words "courts of the United States" are employed in the statute as a synonym for "federal courts". Petitioner also notes scholarly commentary immediately after the passage of the Act, also as quoted by Schwartz, *supra* at footnote 83. See also MacNeill, American Arbitration Law: Reformation, Nationalization, Internationalization (1992), pp. 92-121, 138-147.

The accepted understanding that the FAA governed only cases in federal court is well illustrated, as

late as 1967, by *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967). The question was whether a claim of fraud in the inducement must go to arbitration. The Court determined that it must: "With respect to cases brought *in federal court* involving maritime contracts or those evidencing transactions "in commerce", we think that Congress has provided an explicit answer [in the FAA]." 388 U.S. at 403 (emphasis supplied).

Because the case was a diversity action, *Prima Paint*, in order to reach this result, had to transform the FAA into a source of "substantive" federal right, while at the same time holding it to be "procedural" by weaving its way rather circuitously around *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71-80 (1938). Faced with the claim that substantive law was involved, the Court came down clearly in accord with the view that whether a certain matter was for arbitrators was procedural: "The question in this case is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases . . . [but] [r]ather whether Congress may prescribe how *federal courts* are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." 388 U.S. at 405 (emphasis supplied). Yet, as Justice Black and other dissenters noted, the effect of *Prima Paint,* and indeed part of its rationale, was that the Act "as a matter of federal substantive law, compels a party to a contract containing a written arbitration provision to carry out his 'arbitration agreement' even though a court might, after a fair trial, hold the entire contract –

including the arbitration agreement – void because of fraud in the inducement." 388 U.S. at 407. The resulting elevation by *Prima Paint* of the FAA into federal "substantive law" was important to the *Southland* Court, because it provided a basis for finding that the enforcement of predispute arbitration clauses was somehow a matter of "substantive" federal right, a crucial component of the *Southland* result. 465 U.S. at 11.

The *Prima Paint* Court noted that in 1925, when the Act was passed, Congress was still operating under the pre-*Erie* assumption that it could fashion federal common law which would nevertheless be applicable only in the federal courts. 388 U.S. at 405. This consideration suggests a refutation for an argument considered crucial by the *Southland* Court. The *Southland* Court considered that the use of the language "affecting commerce" suggested strongly that Congress intended the Act to apply in state courts as well as federal ones, because it would otherwise be redundant. *Southland,* 465 U.S. at 14-15. A much more plausible explanation, as noted by Schwartz, *supra* at 21-22, would be that Congress, knowing that it was prescribing a general rule to govern the procedure of federal courts, restricted the application of the rule to cases affecting commerce, precisely to make clear its exclusion from cases which might come into federal court on diversity but which would not involve interstate commerce.

The massive displacement of state law that was always potential in the *Southland* decision has now

become actual, without any sufficient indication that Congress intended such a displacement.

CONCLUSION

These serious issues should be addressed in the exercise of this Court's responsibilities to correct its mistakes and vigorously to police the boundaries of federalism. This is the case in which to do this. In this case there are no complicating questions to affect the process. It is admitted that the contracts in question are in interstate commerce, so the body of cases determining the reach of the words "affecting commerce" is not involved. It is undisputed that the contracts provide for the application of the FAA, so questions of the intent of the parties (insofar as these are meaningful in the case of an adhesion contract pursuant to which a desperate consumer accepts a loan of $300 at an interest rate of 238.04% per annum) will also not affect the result. This case will present in its pure form the question whether the Court has, since 1984, authorized an improper and unintended federalization of a procedural matter of great concern to, indeed affecting the independence and integrity of, the separate judicial systems of the 50 states.

Southland discerned a non-existent Congressional intent to sweep away the ability of the 50 states, within their own judicial systems, to regulate the allocation of decision making between arbitration

and judicial decision. The Court has never considered this issue on the basis of thorough advocacy. The practical injustices that have resulted from this almost accidental ruling are manifest and growing. The controversy over this ruling has grown over the years as the "consumerization" of arbitration law has placed a powerful, but illegitimate, weapon in the hands of the drafters of contracts of adhesion and other form contracts involving great disparity of bargaining power. If indeed Congress intended this result, then that proposition should be established on a basis which can command respect. It if did not, a serious error affecting basic principles of federalism should be rectified.

Respectfully submitted,

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THIRD DIVISION
BLACKBURN, P.J.,
RUFFIN and BERNES, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5, 2002)
http://www.gaappeals.us/rules

March 29, 2007

In the Court of Appeals of Georgia

A07A0781. CRAWFORD v. GREAT AMERICAN CASH BL-039 ADVANCE, INC.

BLACKBURN, Presiding Judge.

In this action involving a "Payday" loan contract, Demetris Crawford appeals from the trial court's grant of Great American Cash Advance, Inc.'s (GACA) motion to compel arbitration of her counterclaim, arguing that the trial court erred in (1) finding that the arbitration clause was enforceable, (2) finding that the Federal Arbitration Act (FAA) governed this matter, and (3) compelling arbitration of an unconscionable contract. Crawford also argues (4) that the doctrine of res judicata precludes arbitration of this matter. For the reasons set forth below, we affirm.

"[T]he question of arbitrability, i.e., whether an agreement creates a duty for the parties to arbitrate the particular grievance, is undeniably an issue for judicial determination. The standard of review from

the grant of a motion to compel arbitration is whether the trial court was correct as a matter of law." (Citation and punctuation omitted.) *Krut v. Whitecap Housing Group.*[1] Furthermore, "the construction of an arbitration agreement, like any other contract, presents a question of law, which is subject to de novo review." *Cash In Advance of Florida v. Jolley.*[2]

So viewed, the record demonstrates that GACA is a South Carolina corporation and is licensed to conduct the business of deferred presentment transactions in South Carolina by the State of South Carolina Board of Financial Institutions. Deferred presentment transactions are more commonly referred to as "payday loans" and can generally be characterized as small-dollar, short-term loans with high interest rates. *Jenkins v. First American Cash Advance of Georgia.*[3] In such transactions, a borrower receives a cash advance that becomes due for repayment within a short period of time. *Id.* As security, the borrower gives a check to the lender in the amount of the cash advance, plus the interest charged by the lender, which is typically quite significant. *Id.*

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[1] *Krut v. Whitecap Housing Group*, 268 Ga. App. 436, 441(2) (602 SE2d 201) (2004).

[2] *Cash In Advance of Florida v. Jolley*, 272 Ga. App. 282 (612 SE2d 101) (2005).

[3] *Jenkins v. First American Cash Advance of Georgia*, 400 F3d 868, 871(I) (11th Cir. 2005).

Over the course of a couple of weeks in December 2004, Demetris Crawford, an Augusta, Georgia resident, traveled across the state line into South Carolina and entered into two payday loan contracts with GACA. Crawford borrowed $300 in both contracts, with the first having an annual percentage rate of 176 percent and the second having an annual percentage rate of 238 percent. Both contracts contained an identical clause entitled "Arbitration," which provided that:

> Any and all disputes or disagreements between the parties arising out of this agreement or any prior agreement (save and except the lender's rights to enforce the borrower(s)' payment obligations, in the event of default by judicial or other process) shall be decided by an arbitrator and in accordance with the procedural rules of the American Arbitration Association as presently published and existing. The parties agree to be bound by the decision of the arbitration(s). The arbitration proceeding shall be a condition precedent to any other court proceeding and shall take place in North Augusta, South Carolina unless another location is mutually agreed to by the parties. Each party shall be responsible for its own costs and expenses in presenting the dispute for arbitration. Notwithstanding the applicability of any other law, to any other provision of this agreement, the Federal Arbitration Act, 9 U.S.C. Section 1ff, shall control the construction, interpretation, and application of this paragraph. Any

> issue as to whether this Agreement is subject to arbitration shall be determined by the arbitrator.

Crawford initialed the arbitration clauses in both loan contracts and also signed both contracts.

Shortly thereafter, Crawford defaulted on both loans. Consequently, GACA filed a collection action in the Magistrate Court of Richmond County, Georgia. Crawford responded and filed a counterclaim, alleging that she was entitled to damages based on the argument that GACA's loans violated the Georgia Payday Loan Act,[4] which prohibited payday lending in Georgia. In addition, Crawford claimed to represent a putative class of similarly damaged Georgia customers. Subsequently, GACA filed a motion to compel arbitration of the entire matter. The magistrate court denied GACA's motion to compel arbitration and dismissed GACA's collection action on the ground that the payday loan contracts were void ab initio. However, the magistrate court also ruled that it could not retain jurisdiction over Crawford's class action counterclaims, and thus transferred the matter to the superior court. After this transfer, GACA renewed its motion to compel arbitration. The superior court held a hearing on the matter and consequently granted GACA's motion. We granted Crawford's interlocutory application, and this appeal followed.

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[4] OCGA § 16-17-1 et seq.

1. Crawford contends that the arbitration clause contained in GACA's payday loan contracts is unconscionable for several reasons and thus unenforceable. Where there is a specific challenge attacking the validity of an arbitration agreement, the court and not the arbitrator should decide whether the arbitration provision is enforceable. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*;[5] *Chastain v. Robinson-Humphrey Co.*;[6] *Stewart v. Favors.*[7]

(a) In this matter, Crawford first argues that the arbitration clause is unconscionable because it allows GACA the alternative remedy of enforcing payment obligations through the judicial process, in addition to arbitration, but does not afford Crawford that same right. This argument is without merit. The record shows that Crawford specifically initialed the arbitration clauses and signed the payday loan contracts, demonstrating her intention to be bound by their terms. *Saturna v. Bickley Constr. Co.*[8] Moreover, an arbitration provision is not unconscionable because

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[5] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (87 SC 1801, 18 LEd2d 1270) (1967).

[6] *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854(II) (11th Cir. 1992).

[7] *Stewart v. Favors*, 264 Ga. App. 156, 158(1) (590 SE2d 186) (2003).

[8] *Saturna v. Bickley Constr. Co.*, 252 Ga. App. 140, 142 (555 SE2d 825) (2001).

it lacks mutuality of remedy. *Id.*; *Caley v. Gulfstream Aerospace Corp.*[9]

(b) Crawford also contends that the arbitration clause is unconscionable because it requires each party to be responsible for "its own costs and expenses in presenting the dispute for arbitration." She argues that this requirement makes it economically infeasible for those like herself to challenge GACA via arbitration. This contention is also without merit. Crawford has not produced any tangible evidence that the requirement that each party bear its own costs and expenses for arbitration will prohibit her from arbitrating this matter. "[T]he mere possibility that [Crawford] could be saddled with prohibitive costs is too speculative to justify the invalidation of [an arbitration] agreement." (Punctuation omitted.) *Cash In Advance of Florida, supra*, 272 Ga. App. at 284-285. *See Green Tree Financial Corp.-Alabama v. Randolph.*[10] Moreover, we have previously held that "lack of sophistication or *economic disadvantage* of one attacking arbitration will not amount to unconscionability." (Emphasis supplied.) *Results Oriented v. Crawford.*[11]

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[9] *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378(II)(E)(4) (11th Cir. 2005).

[10] *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91(III) (121 SC 513, 148 LEd2d 373) (2000).

[11] *Results Oriented v. Crawford*, 245 Ga. App. 432, 441(1)(c) (538 SE2d 73) (2000).

(c) Crawford also contends that the arbitration clause is unconscionable because it provides that the AAA's procedural rules will govern the arbitration, and that borrowers such as herself cannot reasonably be expected to investigate and understand those rules. However, Crawford cites to no evidence or authority in support of this claim. Moreover, as previously noted, Crawford's alleged lack of sophistication does not render the arbitration clause here unconscionable. *Id.*

(d) In both her fourth and fifth arguments supporting her contention that the arbitration clause is unenforceable, Crawford appears to reiterate her previous contention that the provision puts borrowers such as herself at a disadvantage by making it economically difficult for borrowers to assert their rights.[12] However, once again, Crawford provides no evidence in support of her assertion that arbitration is cost prohibitive. *See Cash In Advance of Florida, supra*, 272 Ga. App. at 284-285; *Green Tree Financial Corp.-Alabama v. Randolph, supra*, 531 U.S. at 91(III). In addition, Crawford provides no evidence that any of the agreement's terms will prevent the arbitrator from awarding her the full panoply of relief available under law. *See Bess v. Check Express.*[13]

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[12] To the extent Crawford is also claiming that the payday loan contract in its entirety is unconscionable, we address that contention in Division 3, infra.

[13] *Bess v. Check Express*, 294 F.3d 1298, 1308(III)(C)(1) (11th Cir. 2002).

Accordingly, the trial court did not err in finding that the arbitration clause in GACA's payday loan contracts was enforceable.

2. In her second enumeration of error, Crawford contends that the trial court erred in finding that the FAA was controlling law for this matter. We disagree.

The purpose of the FAA was to reverse the long-standing judicial hostility to arbitration agreements and place such agreements upon the same footing as other contracts. *Gilmer v. Interstate/Johnson Lane Corp.*[14] "The FAA makes enforceable a written arbitration provision in 'a contract provision evidencing a transaction involving commerce.' 9 USC § 2 (2000)." *Jenkins, supra*, 400 F3d at 874(III)(A). Although the FAA contains no express preemption provision and does not reflect a congressional intent to occupy the entire field of arbitration, a "state law may nonetheless be pre-empted to the extent that it actually conflicts with [the FAA] – that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Punctuation omitted.) *Volt Information Sciences v. Bd. of Trustees &c.*[15] To accomplish those congressional objectives, the FAA preempts state laws that undermine enforcement of private arbitration

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[14] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24(II) (111 SC 1647, 114 LEd2d 26) (1991).

[15] *Volt Information Sciences v. Bd. of Trustees &c.*, 489 U.S. 468, 477 (109 SC 1248, 103 LEd2d 488) (1989).

agreements. *Southland Corp. v. Keating*;[16] *Results Oriented, supra*, 245 Ga. App. at 436(1)(a).

Here, Crawford does not dispute that the GACA payday loan contracts contained written arbitration provisions or that the contracts involved interstate commerce. Furthermore, both of the payday loan contracts specifically provide that the FAA "shall control the construction, interpretation, and application" of the arbitration clause. There is no other choice of law provision calling into question any conflict with state law. It is thus clear that the intentions of the parties were that the arbitration would be governed by the FAA. *See Results Oriented, supra*, 245 Ga. App. at 437(1)(a); *Primerica Financial Svcs. v. Wise.*[17] Accordingly, the trial court did not err in finding that the FAA governed this matter.

3. Crawford further contends that the trial court erred in compelling arbitration, arguing that the GACA payday loan contracts are illegal under the Georgia Payday Loan Act and are thus void ab initio. We disagree.

This issue was recently addressed by the United States Supreme Court in *Buckeye Check Cashing v.*

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[16] *Southland Corp. v. Keating*, 465 U.S. 1, 16(III) (104 SC 852, 79 LEd2d 1) (1984).

[17] *Primerica Financial Svcs. v. Wise*, 217 Ga. App. 36, 37(1) (456 SE2d 631) (1995).

Cardegna.[18] In that case, plaintiffs brought claims against Buckeye (a payday lending company) on the grounds that its loans charged usurious interest rates and violated Florida lending and consumer-protection laws. *Id.* at ___(I). When Buckeye moved to compel arbitration, plaintiffs argued that they were not obligated to arbitrate an illegal contract. *Id.* The issue upon which the Supreme Court focused was whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality. *Id.* at ___. The Court held "that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. *Id.* at ___(II)(C). *See Jenkins, supra*, 400 F3d at 882(III)(C); *Bess, supra*, 294 F3d at 1306(III)(B). *See also Results Oriented, supra*, 245 Ga. App. at 438(1)(b).

Here, Crawford entered into presumptively valid agreements to arbitrate any disputes arising out of those agreements, including disputes regarding the validity of the underlying transaction. *See Jenkins, supra*, 400 F3d at 882(III)(C); *Bess, supra*, 294 F3d at 1306(III)(B). Given our holding in Division 1 that the arbitration clause contained in GACA's contracts was not unconscionable and was thus enforceable, Crawford's contention that the contracts are illegal in their entirety is an issue for the arbitrator, not the court, to

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[18] *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (126 SC 1204, 163 LEd2d 1038) (2006).

decide. *See Buckeye Check Cashing, supra*, 546 U.S. at ___(II)(C). Accordingly, the trial court did not err in granting GACA's motion to compel arbitration.

4. In her final enumeration of error, Crawford contends that the doctrine of res judicata precludes arbitration of this matter. Specifically, she argues that the trial court's order in a companion case involving the parties,[19] in which it granted her motion for summary judgment dismissing GACA's collection action against her, should have the effect of precluding the same trial court's order compelling arbitration in this matter. However, Crawford waived this contention. Crawford never raised the issue of res judicata in the trial court and has not alleged any specific error made by the trial court in its order compelling arbitration with regard to this issue. Accordingly, we are precluded from consideration of this alleged enumeration of error on appeal. *See Professional Practices Comm. v. Brewer.*[20]

Judgment affirmed. Ruffin and Bernes, JJ., concur.

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[19] This companion case arose as a result of the magistrate court granting Crawford's motion to separate her counterclaims into a separate action.

[20] *Professional Practices Comm. v. Brewer,* 219 Ga. App. 730, 732(2) (466 SE2d 651) (1995).

SUPREME COURT OF THE STATE OF GEORGIA

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Date: June 25, 2007

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Case No. S07C1138

DEMETRIS CRAWFORD v. GREAT AMERICAN CASH ADVANCE, INC.

COURT OF APPEALS CASE NO. A07A0781

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk